12-2500-11921-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Proposed Permanent Rules Governing Standards for Users of Public Rights-of-Way, Minnesota Rules, Parts 7819.0050-7819.9950.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on January 6, 1999, at 9:30 a.m. in Public Utilities Commission Large Hearing Room, 121 7th Place East, Suite 350, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Public Utilities Commission ("PUC" or "the Commission") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not modifications to the rules proposed by the PUC after initial publication are impermissible substantial changes.

Dan Lipschultz, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101, appeared on behalf of the PUC. The PUC's hearing panel consisted of Virginia Zeller, Staff Attorney, for the Commission.

Approximately 50 persons attended the hearing. Thirty-six persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the date of the hearing, to January 26, 1999. Pursuant to Minn. Stat. § 14.15, subd. 1 (1996), five working days were allowed for the filing of responsive comments. At the close of business on February 2, 1999, the rulemaking record closed for all purposes. The Administrative Law Judge received thirteen written comments from interested persons during the comment period. The PUC submitted written comment responding to matters discussed at the hearings and transmitted two additional comments filed by members of the public with the PUC (rather than the administrative law judge). The PUC suggested several changes to the proposed rules in response to comments received throughout the rulemaking.

This Report must be available for review to all interested persons upon request for at least five working days before the PUC takes any further action on the proposed amendments. The PUC may then adopt a final rule, or modify or withdraw its proposed rule.

When the PUC files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. The PUC filed eighty-nine documents with the Administrative Law Judge at the hearing in this matter. Among those documents were the following:

a) The PUC's Certificate of Authorizing Resolution (Exhibit 88);

b) the PUC's Request for Comments as published at 22 *State Register* 10 and as mailed to persons likely to be interested in the proposed rule (Exhibit 1);

c) a copy of the proposed rules certified by the Revisor of Statutes (Exhibit 2);

d) the Statement of Need and Reasonableness (SONAR) (Exhibit 3);

e) copies of the transmittal letter and certificate of mailing the SONAR to the Legislative Reference Library (Exhibits 4 and 5);

f) the dual Notice of Hearing as mailed and published at 23 *State Register* 1136 (Exhibits 6 and 7);

g) the certification of the Commission's mailing list as accurate and correct, a copy of the list, certification of mailing to that list, and certification of mailing according to the PUC's Notice Plan (Exhibits 8, 9 and 10);

h) the responses received by the PUC to the published Notice of Hearing (Exhibits 11-86); and

i) a list of proposed rule modifications suggested by PUC staff (Exhibit 89).

2. On July 7, 1997, the PUC published the Request for Comments in 22 *State Register* 10.[1]

3. On October 12, 1998, the PUC requested that the Chief Administrative Law Judge schedule a hearing for the proposed rules governing standards for public rights-of-way use. Accompanying that request was the Dual Notice of Hearing proposed to be issued, a copy of the proposed rules as certified by the Revisor of

Statutes, and a draft of the SONAR. In addition, the PUC requested approval of its Notice Plan under Minn. Stat. § 14.14, subd. 1a.

4. On October 19, 1998, the PUC's Notice Plan was approved by the Administrative Law Judge.

5. On October 22, 1998, the PUC mailed the Dual Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.[2]

6. On November 2, 1998, the PUC published a copy of the proposed rules and the Dual Notice of Hearing at 23 *State Register* 1136.[3]

7. The PUC received requests for hearing from more than twenty-five persons, thereby triggering the requirement that a hearing be held.[4]

Statutory Authority.

8. In its SONAR, the PUC cites Laws of Minnesota 1997, Chapter 123, section 4, subd. 6(c), now codified as Minn. Stat. § 237.163, subd. 6(c), as background for the need to adopt proposed rules. The statute states:

> c) The rights, duties, and obligations regarding the use of the public right-of-way imposed under this section must be applied to all users of the public right-of-way, including the local government unit while recognizing regulation must reflect the distinct engineering, construction, operation, maintenance and public and worker safety requirements, and standards applicable to various users of the public rights-of-way. For users subject to the franchising authority of a local government unit, to the extent those rights, duties, and obligations are addressed in the terms of an applicable franchise agreement, the terms of the franchise shall prevail over any conflicting provision in an ordinance.

9. The PUC cites Minn. Stat. § 237.163, subd. 8(a) as providing the statutory authority to adopt the proposed rules. This statutory item states:

> Subd. 8. **Uniform statewide standards**. (a) To ensure the safe and convenient use of public rights-of-way in the state, the public utilities commission shall develop and adopt by March 1, 1998, statewide construction standards for the purposes of achieving substantial uniformity in construction standards where appropriate, providing competitive neutrality among telecommunications right-of-way users, and permitting efficient use of technology. The standards shall govern:
>
> > (1) the terms and conditions of right-of-way construction, excavation, maintenance, and repair; and

(2) the terms and conditions under which telecommunications facilities and equipment are placed in the public right-of-way.

10. The Commission's general rulemaking statutory authority is found in Minn. Stat. §§ 216A.05, 216B.08, and 237.10. The Commission noted that the statutory deadline for adoption of these rules was changed from March 1, 1998, to June 1, 1999.[5]

11. The PUC is expressly authorized to implement right-of-way rules. The issues of statutory authority raised regarding the scope of the rules and certain provisions will be discussed along with the analysis of the particular rule language at issue. The Administrative Law Judge concludes that the PUC has the statutory authority to promulgate these rules.

Nature of the Proposed Rules.

12. Public rights-of-way are used for more than carrying surface traffic. Under Minn. Stat. § 222.37, subd. 1:

> Any water power, telegraph, telephone, pneumatic tube, pipeline, community antenna television, cable communications or electric light, heat, power company, or fire department may use public roads for the purpose of constructing, using, operating, and maintaining lines, subways, canals, conduits, hydrants, or dry hydrants, for their business, but such lines shall be so located as in no way to interfere with the safety and convenience of ordinary travel along or over the same . . . .

13. With the recent proliferation of new technologies (primarily in the telecommunications area), utilities and service providers have required access to public rights-of-way for the installation and maintenance of service lines. Numerous conflicts have arisen between utilities, local governmental units (LGUs), affected contractors, and others over the rights and responsibilities of everyone affected by disturbing rights-of-way. The proposed rules establish uniform standards for access to, use of, and remediation regarding rights-of-way.

Task Force Participation in Rule Development.

14. Under Minnesota Laws 1997, Chapter 123, Section 9, the PUC was required to convene a task force comprised of "(1) local government units; and (2) affected utilities and other users of the public rights-of-way, to establish recommendations to the commission regarding the uniform statewide standards required under section 4, subdivision 8." Additional areas for the task force to address were "degradation costs, right-of-way mapping systems; high-density corridors, indemnification of LGUs, and a model ordinance made available for use by LGUs for regulating use of public rights-of-way.[6] Actively participating in the task force were:

> League of Minnesota Cities (LMC);
> Association of Minnesota Counties;

City Engineers Association of Minnesota;
City of Fridley; City of Minneapolis;
City of Redwood Falls;
City of Rochester;
City of St. Paul;
Suburban Rate Authority;
City of Duluth;
City of Detroit Lakes;
Minnesota Association of Townships (Township Association);
AT&T Communications of the Midwest, Inc. (AT&T);
Cooperative Power Association (Cooperative Power);
MCI Communications (MCI);
Minnegasco;
Minnesota Business Utility Users Council (MBUUC);
Minnesota Cable Communications Association (Cable Association);
Minnesota Telephone Association (MTA);
Minnesota Independent Coalition (MIC);
Northern States Power Company (NSP);
Sprint;
US WEST Communications, Inc. (US WEST);
UtiliCorp United (UtiliCorp);
GTE Telephone Operations (GTE);
and Dakota Electric Association.

15. The participants were evenly divided between LGUs and users of the public rights-of-way, as mandated by the legislation requiring the task force. After a series of meetings and discussions, the task force submitted recommendations and comments concerning the proposed rulemaking to the PUC.

16. In addition to the task force, the PUC enlisted the assistance of an advisory committee in drafting the proposed rule, working with Commission staff and beginning with the task force recommendations and comments. The advisory committee consisted of representatives from the Association of Minnesota Counties; AT&T; the City of Minneapolis; the City of Redwood Falls; the Department of Public Service; GTE; Interstate Power Company; the LMC; MCI; Minnegasco; the Township Association; MBUUC; Cable Association; MIC; Minnesota Power; MTA; the Minnesota Office of Pipeline Safety (OPS); NSP; US WEST; and UtiliCorp.

Cost and Alternative Assessments in SONAR.

17. Minn. Stat. § 14.131 provides that state agencies proposing rules must identify classes of persons affected by the rule, including those incurring costs and those reaping benefits; the probable effect upon state agencies and state revenues; whether less costly or less intrusive means exist for achieving the rule's goals; what alternatives were considered and the reasons why any such alternatives were not chosen; the costs that will be incurred complying with the rule; and differences between the proposed rules and existing federal regulations.

18. The PUC concluded that the rules will result in some additional costs to the Commission itself. Other state agencies were believed to be affected to some extent.[7] The persons or groups that the PUC concludes will be most affected by the rules are:

Classes of persons probably affected:

- telecommunications right-of-way users and persons owning or controlling a facility in the public right-of-way, or seeking to own or control a facility in the public right-of-way, that is used or intended to be used for providing utility service, and who have rights under law, franchise, or ordinance to use the public right-of-way
- employees or agents of, or independent contractors hired by, the aforementioned persons for the purpose of excavating in or obstructing the public right-of-way
- the governing bodies of local government units--including counties, home rule charter or statutory cities, or towns
- government agencies overseeing the conformity of the aforementioned parties to relevant statutes and rules

Classes of persons who will probably bear the cost of the proposed rules:

- telecommunications right-of-way users and persons owning or controlling a facility in the public right-of-way, or seeking to own or control a facility in the public right-of-way, that is used or intended to be used for providing utility service, and who have rights under law, franchise, or ordinance to use the public right-of-way
- employees or agents of, or independent contractors hired by, the aforementioned persons for the purpose of excavating in or obstructing the public right-of-way
- the governing bodies of local government units--including counties, home rule charter or statutory cities, or towns
- government agencies overseeing the conformity of the aforementioned parties to relevant statutes and rules

Classes of persons that will probably benefit from the proposed rules:

- telecommunications right-of-way users and persons owning or controlling a facility in the public right-of-way, or seeking to own or control a facility in the public right-of-way, that is used or intended to be used for providing utility service, and who have rights under law, franchise, or ordinance to use the public right-of-way

- employees or agents of, or independent contractors hired by, the aforementioned persons for the purpose of excavating in or obstructing the public right-of-way

- the governing bodies of local government units--including counties, home rule charter or statutory cities, or towns

- government agencies overseeing the conformity of the aforementioned parties to relevant statutes and rules[8]

19. The PUC 's analysis did not attempt to quantify actual costs. Since much of the conduct regulated by the rules is discretionary, including the role of LGUs in right-of-way management, the lack of quantification is understandable. The PUC indicated that there were no less costly or less intrusive alternatives to the proposed rule.[9] The PUC considered the cost imposed by each item in the rule and actively sought to propose the least expensive alternative consistent with the Commission's obligation to meet public utility service and right-of-way usage needs. Specifically, the PUC eliminated two construction standards, a bonding requirement, and an accounting requirement as imposing unnecessary costs.[10] In general, the less costly alternatives proposed by commentators remove standards that are needed to protect the public interests identified by the PUC in proposing these rules.

20. Any agency adopting rules must assess all differences between the proposed rule and existing federal regulations. The PUC has indicated that there are no requirements in the rules in conflict with Federal standards.[11]

Superior Achievement through Rulemaking.

21. An agency proposing rules must include in its SONAR a description of "how the agency, in developing the rules, considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002."[12] The legislative policy identified by the statute was to introduce means of superior achievement in the manner that agency rules operate. The PUC identified a number of rules that do not contain prescriptive requirements to allow superior achievement.[13] The PUC also noted that the primary legislative goal for these rules was to standardize the maintenance, use, management standards, and permitting processes for rights-of-way.[14] The PUC has met the statutory standard for introducing flexibility into the proposed rules to arrive at superior achievement in meeting the goals of this rulemaking.

Effect on Farming Operations.

22. Minn. Stat. § 14.111 (1996), imposes an additional notice requirement when rules are proposed that affect farming operations. The proposed rules will not affect farming operations and the PUC is not obligated to provide the additional notice required under the statute.

Standards for Analyzing Proposed Rules.

23. In a rulemaking proceeding, an administrative law judge must determine whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts.[15] An agency need not always support a rule with adjudicative or trial-type facts. It may rely on what are called “legislative facts” — that is, general facts concerning questions of law, policy, and discretion. The agency may also rely on interpretations of statutes and on stated policy preferences.[16] Here, the PUC prepared a SONAR setting out a number of facts, statutory interpretations, and policy preferences to support the proposed rules. It also supplemented information in the SONAR with information presented both at the hearing and in written comments and responses placed in the record after the hearing.

24. Inquiry into whether a rule is reasonable focuses on whether the rulemaking record establishes that it has a rational basis, as opposed to being arbitrary. Minnesota law equates an unreasonable rule with an arbitrary rule.[17] Agency action is arbitrary or unreasonable when it takes place without considering surrounding facts and circumstances or disregards them.[18] On the other hand, a rule is generally considered reasonable if it is rationally related to the end the governing statute seeks to achieve.[19]

25. The Minnesota Supreme Court has defined an agency's burden in adopting rules as having to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[20] An agency is entitled to make choices between different approaches as long as its choice is rational. Generally, it is not proper for an administrative law judge to determine which policy alternative might present the "best" approach, since making a judgment like that invades the policy-making discretion of the agency. Rather, the question for an administrative law judge is whether the agency’s choice is one that a rational person could have made.[21]

26. In addition to ascertaining whether proposed rules are necessary and reasonable, an administrative law judge must make other decisions — namely, whether the agency complied with the rule adoption procedure; whether the rule grants undue discretion to the agency; whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or illegal; whether the rule constitutes an undue delegation of authority to another; and whether the proposed language is not a rule.[22] The SONAR contains information establishing the need for and reasonableness of most of the proposed rules, and the PUC’s compliance with laws governing the rulemaking process is apparent in most cases. Moreover, a majority of provisions drew no unfavorable public comment. For these reasons, the Administrative Law Judge will not discuss every part and subpart of the proposed rules in this report. Rather, he finds that the PUC has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report. He also finds that all provisions not specifically discussed are authorized by statute and that there are no other problems that would prevent their adoption.

27. When an agency makes changes to proposed rules after it publishes them in the *State Register*, an administrative law judge must determine if the new language is substantially different from what the agency originally proposed.[23] The

legislature has established standards for determining if the new language is substantially different.[24]

Proposed Rule 7819.0050 - Applicability.

28. Proposed rule 7819.0050 describes the situations where work in the public right-of-way is governed by these rules. Which rules apply and when are subject to the actions of LGUs, since LGUs can adopt ordinances to govern the process by which permits are issued and work conducted.[25] The rule language reflects the authority of those LGUs that have adopted ordinances to manage the rights-of-way under their jurisdiction. The PUC has included language to clarify that three parts of the rule are applicable regardless of an LGU's decision to forego adoption of an ordinance. Some of the changes came at the suggestion of the Industry.[26]

29. The Minnesota Association of Community Telecommunications Administrators (MACTA) urged that the rule be amended to expressly exclude cable franchisees. This suggestion is based on MACTA's assertion that the PUC lacks the statutory authority to regulate cable franchisees. MACTA maintains that the statutory definition of telecommunications right-of-way users indicates that the PUC is authorized only to adopt right-of-way rules governing those users.[27]

30. The LMC suggested that the entire rule be clarified by expressly limiting the applicability of the rule to "telecommunications right-of-way users."[28] The LMC asserted that the proposed rules exceeded the statutory authority of the PUC insofar as the rules purport to affect natural gas, electric, and cable utilities. In advancing this argument, the LMC maintains that "The Commission's interpretation [of Minn. Stat. § 237.163] ignores far too much legislative history, statutory language granting authority to LGUs to manage the ROW, and statutory inconsistencies."[29] As a starting point, LMC argues that the legislative intent cannot be "drawn solely from the four corners of the legislation.[30]

31. The Industry and Bresnan Communications. Inc., asserted that the plain language of the statute at issue demonstrates that the PUC is authorized to adopt uniform rules governing certain work in rights-of-way. The PUC responded that:

> In the September hearings, the Commission determined, based on its experience and expertise in regulating the provision of gas, telephone, and electric service, that the policies underlying the right-of-way statute could be effectuated only by applying the rules to all right-of-way users. The Commission also determined that the wording of the statute indicated the legislature's intent to provide standards for all right-of-way users. The Commission found that the terms and conditions of right-of-way fees and penalties, vacation, abandonment, relocation, and construction and location requirements were appropriate subjects for statewide standards. Based on these considerations, the Commission decided that the rules should govern all right-of-way users and should establish certain

standards for right-of-way fees and penalties, vacation, abandonment, relocation, and construction and location requirements.[31]

32. The first rule of statutory interpretation is that the plain language of the statute controls.[32] Only when the plain language is ambiguous or contradictory do other rules of statutory interpretation apply.[33] In this rulemaking, the legislative intent is contained in the express language of Minn. Stat. § 237.163, subd. 6(c), which applies the regulatory standards of the statute to "all users of the public right-of-way. . . ." There is no ambiguity in the statute. The language concluding that item explicitly addresses the impact of existing franchise agreements that conflict with ordinances to be adopted under the Commission's rule.[34] There is no basis for asserting a conflict between the stated legislative intent for the PUC's rulemaking and the ordinance authority held by LGUs.[35]

33. The statutory provisions directly authorizing these rules provides additional express language including all users of the public right-of-way. Reading all the provisions of Minn. Stat. §§ 237.162 and 237.163 together, the Legislature clearly differentiated between obligations of all users of rights-of-way and obligations specific to telecommunications users of rights-of-way. The PUC explained the difference as incorporating the specific construction standards required of natural gas and electric utilities by other statutes.

34. Minn. Stat. § 237.163, subd. 8(a), requires the PUC to adopt "statewide construction standards for the purposes of achieving substantial statewide uniformity in construction standards where appropriate, providing competitive neutrality among telecommunications right-of-way users, and permitting efficient use of technology." The LMC maintains that "telecommunications right-of-way users" (mentioned in the second clause) actually refers to the entire item. This interpretation would require reading into the statute the word "telecommunications" before "users" and in several instances, to use "telecommunications" in the place of the word "all." There is no basis in the canons of statutory construction to construe these statutory provisions in such fashion.[36]

35. Similarly, the conflict asserted by MACTA between the proposed rules and the LGUs' cable television franchise authority falls before the express language of the statute. Existing franchise agreements are protected against inconsistent ordinance provisions by operation of Minn. Stat. § 237.163, subd. 6(c). LGUs are prohibited from adopting ordinances or other regulations (including future franchise agreements) inconsistent with these statewide standards by Minn. Stat. § 237.163, subd. 8(c). There is no conflict in the statute and no absence of statutory authority to adopt these rules. The PUC's modification of the rule part to explicitly apply the rules to all right-of-way users is needed, reasonable, and consistent with the Commission's statutory authority. The other changes the PUC made to the rule add an applicable rule part and clarify when another part is not applicable. None of the changes to the rule constitute substantially different language from the rule as published in the *State Register*.

Proposed Rule 7819.0100 - Definitions.

36. Subpart 2 of proposed rule 7819.0100 defines "abandoned facility" for the purposes of the rules. The need to define this term arises because proposed rule 7819.3300 requires facility owners to provide LGUs notice of their abandoned facilities. More generally, these facilities are placed below ground and when excavating in their vicinity, it is important to know whether any of these services might be interrupted by the work. Several commentators in the telecommunications area expressed concern that their current installation of excess capacity in fiber optic cable (known as "dark fiber" since light is not currently being passed through it) would fall under the definition of "abandoned facility," despite the expectation that such dark fiber will be used to meet future needs. OPS expressed concern that adopting this rule could constitute an improper delegation of authority.[37]

37. Based on these comments, the PUC modified the definition to conform substantially to the language being developed by OPS. That language provides a reasonable, understandable standard for determining if a utility facility is abandoned: the facility is no longer in service and it is physically disconnected from a portion of the operating facility, or from any other facility, that is in use or still carries service, and must be declared to be abandoned by the owner. The PUC also clarified that "abandoned" under these rules does not have an impact on any other rules. The modified rule is needed and reasonable as proposed. The new language is not substantially different from the rule as published in the *State Register*.

38. Subpart 7 defines "degradation cost" as the cost estimated by the LGU at the time a permit is issued, to restore the right-of-way using the examples provided in the rules. The Industry objected to the estimation by example provision of the rule and suggested replacing that process with a reference to rule part 7819.1100.[38] The referenced rule part does not contain any provision for arriving at a cost estimate at the time that the permit is issued. The PUC replied to this suggestion as follows:

> The Commission continues to find that the rules properly define the degradation cost as the cost to achieve a level of restoration not to exceed the maximum restoration shown in the plates.[39] The plates serve their purpose of providing an objective standard--a benchmark that parties can readily understand--before the project is underway. Using the plates as a benchmark is fair because, at the up-front time of calculation and decision-making in the permit process, a right-of-way user may choose to restore the right-of-way itself rather than pay a degradation fee if the right-of-way user believes the calculated degradation cost (and thus, degradation fee) is higher than the actual cost of restoration would be.[40]

39. The PUC has made the affirmative presentation of facts required to demonstrate the need and reasonableness of the proposed definition.

Proposed Rule 7819.0200 - High-Density Corridor.

40. Proposed rule part 7819.0200 identifies the relocation standard for high-density corridors. High-density corridors are used by LGUs to address congestion in

right-of-way usage. Once congestion is identified, LGUs can require users to relocate facilities into the high-density corridor. Since such relocation requires that users incur costs, the Industry urged that high standards be imposed in the rule and suggested the rule include a requirement that the LGU "demonstrate compelling need in written findings."[41] The LMC objected to the change as only seeking "to make it more difficult for the LGU to establish good cause for relocation into a high density corridor."[42]

41. Based the suggestions, the PUC amended the rule as follows:

~~In order to require the relocation of~~ Existing telecommunications facilities shall not be relocated to ~~into~~ the high-density corridor~~, the local government unit must make a written finding of compelling need~~ unless required pursuant to part 7819.3100.

42. The Commission explained the change as a means to "link the concept of relocation of existing telecommunications facilities to a high-density corridor to the general principles of relocation of existing facilities under part 7819.3100."[43] The referenced rule sets the standards under which LGUs can require users to relocate facilities in the right-of-way at the users' expense. In modifying the proposed rule, the PUC has proposed a standard that is both needed and reasonable to accommodate the legitimate interests of LGUs and users of rights-of-way in congested situations. The new language is not substantially different from the rule as published in the *State Register*.

Proposed Rule 7819.1000 - Fees and Penalties.

43. Proposed rule 7819.1000 is composed of three subparts and requires LGUs to make permit fee schedules available to the public and to allocate fees charged so as to be competitively neutral. The rule also allows the LGU to establish penalties for delays in construction, subject to certain restrictions. The LMC maintained that this rule was outside the statutory authority granted to the Commission. The Industry proposed amending the rule to require LGUs be required to transfer funds for LGU-operated utilities subject to fees; require penalties be applied to reduce the following years LGU management costs; and explicitly reference the appeal procedures of Minn. Stat. § 237.163, subd. 5. The PUC declined to make those changes, characterizing them as "beyond what is necessary."[44]

44. Minn. Stat. § 237.163, subd. 8(a)(1) authorizes the PUC to set standards that govern the "terms and conditions of right-of-way construction, excavation, maintenance, and repair. . . ." Permit fees and penalties fall within the scope of "terms and conditions." The rule as proposed has been shown to be needed and reasonable in setting fees and creating standards for penalty provisions.

Proposed Rule 7819.1100 - Restoration of Right-of-Way.

45. A significant portion of the impetus to the adoption of these rules is the need to establish standards governing the restoration of rights-of-way after installation or maintenance work is completed. Proposed rule 7819.1100 requires restoration to the same condition that existed before the excavation. Thirteen plates provide maximum levels of restoration that may be required by LGUs. Lesser levels of restoration may be agreed to by the right-of-way user and the LGU. The title of subpart 3 was changed by the Commission to conform the title to the term (“degradation fee”) used in the rule. Proposed rule 7819.1100 is needed and reasonable. The new language is not substantially different from the rule as published in the *State Register*.

Proposed Rule 7819.1200 - Notice.

46. The PUC proposed rule 7819.1200 to resolve a source of conflict between right-of-way users and LGUs, that is, when the LGU must be notified of work to be performed in the right-of-way. The PUC supported its proposed language as follows:

> The rule presumption toward an annual waiver requirement can be overcome, however, through negotiation between the LGU and the right-of-way user. The rule thus provides a reasonable balance between two interests: the LGU--sometimes a small, rural township without a sophisticated form of governance, which may benefit from the "default" requirements of annual waiver renewals; and the utility--sometimes a familiar, nonthreatening presence in the right-of-way, which may be unnecessarily burdened by annual waiver requirements from hundreds of townships, absent the option of negotiating less frequent waiver provisions.[45]

47. The notice requirement as originally proposed, made no distinction between excavation and other forms of work that would make minimal disruption to the use of the right-of-way. The Industry, Minnesota Power, and Otter Tail Power expressed concern that the proposed rules could be read to require written notice before any obstruction of a right-of-way, even down to a 10-minute repair stop. In some roadways, the only place to park is in the road itself, since there are no shoulders to avoid such obstructions. These commentators noted that requiring written notices to LGUs before each such stop, regardless of duration would increase costs to consumers. To address these concerns, the commentators proposed eliminating the notice requirement when excavation is performed in untraveled rights-of-way and when only one lane of traffic is obstructed or the obstruction will last less than two hours. The Minnesota Association of Townships objected to widespread elimination of the notice requirement citing the current experience of "spotty" compliance and failures to restore the right-of-way after performing work.[46]

48. The PUC declined to amend the rule relating to excavations in untraveled rights-of-way, since such excavations are planned in advance, notice would impose no additional cost on users or consumers, and the LGUs are entitled to minimal notice of excavations.[47] The PUC adopted the modification supported by the Minnesota Association of Townships to allow minimal obstructions of the public right-of-way without prior notice. The LGUs most affected have indicated that notices are not required in all situations. Subpart 2 was modified to clarify that an LGU can agree to different notice period. A new subpart 3 was added to clarify that the notice requirement of the rule does not apply where the LGU has adopted an ordinance with a notice or permit in lieu of notice requirement. Proposed Rule 7819.1200 is needed and reasonable as modified. The new language is not substantially different from the rule as published in the *State Register*.

Proposed Rule 7819.1250 - Indemnification.

49. One problem arising for LGUs when users of rights-of-way are conducting work is the potential for legal claims. As a result, LGUs routinely seek indemnification

from users of the rights-of-way in the permit process. Proposed rule 7819.1250 sets the standards for indemnification of LGUs. The language proposed by the PUC was arrived at in negotiations between the Task Force members after the conclusion of the formal process.[48] The PUC modified subpart 5 to change the term “construction authorization” to “local government unit’s authorization to proceed.” The PUC supported the new language as needed to conform the rule to "standard township practice, in which townships often verbally authorize right-of-way projects following notice by the utility."[49] The new language is not substantially different from the rules as published in the *State Register*. Subpart 5 is needed and reasonable as proposed.

Proposed Rule 7819.1300 - Completion Certificate.

50. The current industry practice requires a utility to repair the right-of-way at any time the street fails due to that utility’s excavation, subject only to the terms of its franchise agreement. Proposed rule 7819.1300 follows that approach in setting the standards for issuance of a completion certificate, leaving the obligation to restore with the utility. The Industry proposed changing the proposed rule to limit the obligation to restore to two years from completion. This change was suggested to conform the obligation to restore to the term of the performance bond required of the utility.[50] The LMC objected to the suggested language as a significant change from the current practice.[51] The PUC noted that:

> The two concepts [the bond and the obligation to repair] are only tangentially linked: the performance bond rule provides the standards for an LGU’s holding a security to draw upon if a right-of-way user fails to repair; the Industry’s proposed language would provide a species of warranty period beyond which a right-of-way user has no obligation to repair.[52]

51. Based on the current practice and the lack of any showing that a two-year limit was needed, the PUC declined to change the proposed rule. The rule has been shown to be needed and reasonable.

Proposed Rule 7819.3000 - Construction Performance Bond.

52. When excavation is done in the public rights-of-way, damage results. LGUs have an interest in ensuring that such damage is restored, to provide for others that seek to safely use the rights-of-way. Proposed rule 7819.3000 establishes standards to be met by users of rights-of-way in providing performance bonds to compensate LGUs where a right-of-way is not restored. The proposed rule establishes the potential damage that may be included in the bond amount and the term of the bonding obligation. Despite its assertions regarding the propriety of a two-year period for restoration,[53] the Industry maintained that 12 months was the appropriate time for bonding to run. The LGUs asserted that 12 months was too short a time for defects in restoration to be discovered and suggested 24 months as the appropriate period. The PUC agreed with the LGUs and set the bond period at 24 months. Proposed rule 7819.3000 is needed and reasonable as proposed.[54]

Proposed Rule 7819.3100 - Relocation of Existing Facilities.

53. Proposed rule 7819.3100 requires users of the public right-of-way to relocate when required by the LGU for a public project, public health or safety, or the safety and convenience of travel over the right-of-way. The Industry proposed that a standard be added that an LGU cannot required relocation if a reasonable alternative exists to avoid interference with a public project. The PUC responded as follows:

> The LGU retains its management authority over its right-of-way, including its ability to "establish and define location and relocation requirements." The LGU is the appropriate entity to determine the day-to-day management decisions over its right-of-way, so long as the decisions conform to the rules' standards. The LGU may be able to articulate specific public health or safety issues that arise outside of an LGU improvement construction context and yet fit within the standards of the rule. So long as the LGU conforms to the specific standards to require relocation found in part 7819.3100, the LGU has the right to require relocation to prevent utility interference with the public health or safety (or with public projects or the safety and convenience of travel over the right-of-way).[55]

54. The LMC argued that the PUC lacked statutory authority to adopt this rule, since LGUs specify location and relocation of facilities. The setting of statewide standards falls within the "terms and conditions" authority granted to the Commission under Minn. Stat. 237.163, subd. 8(a)(1). The PUC has demonstrated the rule part to be needed and reasonable.

Proposed Rule 7819.3300 - Abandoned Facilities.

55. Proposed rule 7819.3300 sets the notification requirements when a user of a right-of-way abandons its facility there, and establishes standards for LGUs requiring removal of abandoned facilities. The need for notification is tied to the mapping requirements established to protect users of rights-of-way and the general public.[56] The Industry urged modifying the rule to explicitly state that the abandoned facility must pose an obstacle to excavation, construction or right-of-way repair before the LGU could require that the facility be removed. The rule language was supported by the PUC as providing "needed standardization without unduly restricting LGU right-of-way management or unduly burdening right-of-way users."[57] As originally proposed, the required removal would occur during the first scheduled LGU excavation. The PUC deleted that requirement as adding nothing to the rule.[58] The rule language, as modified, reflects the statutory standard for LGUs in Minn. Stat. § 237.162, subd. 8(9). Proposed rule 7819.3300 is needed and reasonable as modified. The new language is not substantially different from the rules as published in the *State Register*.

Proposed Rule 7819.4100 - Mapping Systems.

56. Burying facilities in the ground provides protection for the facility, but poses a risk for anyone digging in the vicinity of that facility. To address these risks Minn. Stat. § 216D.04, subd. 3, establishes a central clearinghouse (commonly known as Gopher State One Call) for informing utilities of proposed excavation in the vicinity of listed facilities. Under item e of the subdivision, "operators shall maintain maps, drawings, diagrams, or other records of any underground facility abandoned or out-of-service after December 31, 1998."[59] Proposed rule 7819.4100 creates standard information regarding the location of facilities in the right-of-way that must be provided to the LGU upon request. The format for the information provided may be the LGU's coordinate system, if any, offsets from generally recognized locations in the public rights-of-way, or any other agreed-upon system. The rule provides for updating the information where needed.

57. To ensure that right-of-way users were not subject to excessive costs, subpart 5 requires only that the mapping data be provided to the LGU in the manner maintained by the utility. The Commission supported this requirement by noting that "The addition of 'translation' costs to the permit fee ensures that the LGU need not absorb the costs of converting different types of data to the LGU's mapping system."[60] LMC pointed out that the costs of translation would not likely be known by the LGU prior to receiving the information, which would only happen after the permit fee had been paid. To address this inconsistency, the PUC added language to clarify that data conversion costs can be added to the permit fee after the application process.[61] Proposed rule 7819.4100 is needed and reasonable as modified. The new language is not substantially different from the rules as published in the *State Register*.

Proposed Rule 7819.5000 - Installation of Telecommunications Facility.

58. A point of contention for LGUs and the users of the public rights-of-way are construction standards that must be met for the installation of telecommunication equipment. In arriving at the language of proposed rule 7819.5000, the PUC stated:

> The rule setting a minimum depth of placement provides welcome standardization of methods for telecommunications right-of-way users wishing to lay fiber facilities across the state. The standardization will facilitate competitive entry and minimize costs of planning and regulatory compliance procedures for old and new entrants alike. Inclusion of minimum depth in rules also aids all LGUs, who can look to the rules for a reasonable standard developed by a group of experts representing all major segments of the telecommunications industry and LGUs of every size.[62]

59. In arriving at its proposed standards, the PUC is carrying out the legislative intent expressed at Minn. Stat. § 237.163, subd. 1. Standardization precludes disparate treatment of telecommunication right-of-way users, in accordance with Minn. Stat. § 237.163, subd. 7(a). At the hearing in this matter, the Industry proposed establishing a maximum depth of 48 inches for fiber facilities (identical to the maximum for copper). Commentators also agreed that LGUs should have the ability to

vary the standard on a case-by-case basis. That flexibility is provided to LGUs for copper facilities in the proposed rules. On the basis of these comments, the PUC modified item F accordingly. Establishing a range for the acceptable depth of fiber, subject to case-by-case review by an LGU, is needed and reasonable. Proposed rule 7819.5000 is needed and reasonable as modified. The new language is not substantially different from the rules as published in the *State Register*.

60. Associated General Contractors of Minnesota (AGC) urged that a deadline of fifteen days for relocating facilities be adopted. This standard was advanced to prevent undue delay in relocating facilities from increasing costs and constituting a worksite hazard.[63] AGC indicated the fifteen-day standard was taken from a Minnesota Department of Transportation rule (Minn. Rule 8810.3300). The Industry responded that the fifteen-day period was for initiating the work, not completing it. The cited rule specifies that the utility has fifteen days to begin work and the work must be completed by the date specified in the notice, "which date shall be reasonable under the circumstances."[64] The need for a work completion deadline set in the rule has not been demonstrated.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Public Utilities Commission (“PUC”) gave proper notice of this rulemaking hearing.

2. The PUC has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The PUC has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. The PUC has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. The additions and amendments to the proposed rules which were suggested by the PUC after publication of the proposed rules in the *State Register* do not result in rules which are substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the PUC from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in the record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted.

Dated this 3rd day of March, 1999.

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Tape Recorded; No Transcript.

[1] Exhibit 1.
[2] Exhibit 8.
[3] Exhibit 7.
[4] Exhibits 11-86.
[5] Laws of Minnesota 1998, Chapter 345, Section 4.
[6] Minnesota Laws 1997, Chapter 123, Section 9.
[7] SONAR, at 11.
[8] SONAR, at 10-11.
[9] SONAR, at 12.
[10] SONAR, at 12.
[11] SONAR, at 13.
[12] Minn. Stat. § 14.002.
[13] SONAR, at 15-16.
[14] SONAR, at 14-15.
[15] Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100.
[16] Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984); Mammenga v. Department of Human Services, 442 N.W.2d 786 (Minn. 1989).
[17] In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).
[18] Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975).

[19] Mammenga v. Department of Human Services, 442 N.W.2d 786, 789-90 (Minn. 1989); Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

[20] Manufactured Housing Institute, supra, 347 N.W.2d at 244.

[21] Federal Security Administrator v. Quaker Oats Company, 318 U.S. 2, 233 (1943).

[22] Minn. Rule 1400.2100.

[23] Minn. Stat. § 14.15, subd. 3.

[24] Minn. Stat. § 14.05, subd. 2

[25] Minn. Stat. § 237.163, subd. 2(b).

[26] Exhibit 100, at 13. "The Industry" is used throughout the rulemaking to describe certain telecommunications, natural gas and electric right-of-way users who participated as a group in this matter. Specifically, the Industry is composed of the Minnesota Telephone Association, the Minnesota Independent Coalition, US WEST, AT&T, Sprint, MCI, Minnesota Cable Communications Association, McLeod USA, NSP, Minnegasco, Minnesota Power, Utilicorp, Great Plains Natural Gas, Alliant Utilities-Interstate Power Company, and the Minnesota Business Utility Users Council.

[27] Exhibit 99, at 4.

[28] LMC Brief, at 31.

[29] LMC Brief, at 2.

[30] *Id*. at 3.

[31] PUC Reply, at 22.

[32] Minn. Stat. § 645.16, " When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit."

[33] When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:
(1) The occasion and necessity for the law;
(2) The circumstances under which it was enacted;
(3) The mischief to be remedied;
(4) The object to be attained;
(5) The former law, if any, including other laws upon the same or similar subjects;
(6) The consequences of a particular interpretation;
(7) The contemporaneous legislative history; and
(8) Legislative and administrative interpretations of the statute.

Minn. Stat. § 645.16.

[34] "For users subject to the franchising authority of a local government unit, to the extent those rights, duties, and obligations are addressed in the terms of an applicable franchise agreement, the terms of the franchise shall prevail over any conflicting provision in an ordinance." Minn. Stat. § 237.163, subd. 6(c).

[35] MACTA maintains that Minn. Stat. § 237.81 indicates that LGU authority "would be superceded only with respect to telecommunications right-of-way users and local regulation of such users." Exhibit 99, at 5. The cited statute clearly indicates that some statutory provisions supercede others. The cited statute contains no language limiting the effect of those cited statutes to telecommunications right-of-way users.

[36] If the circumstances surrounding the adoption of these provisions were to be considered, the result would not change. The requirement for providing competitive neutrality among telecommunications right-of-way users found in Minn. Stat. § 237.163, subd. 8(a), parallels the requirements in the Telecommunications Act of 1996, 47 USC § 151, et seq. The specific legislative history provided by the Industry demonstrates that the statutory provisions, when finally adopted, were intended to authorize uniform construction standards governing all utilities using the public rights-of-way.

[37] Exhibit 102, at 1-2.

[38] Exhibit 100, at 14.

[39] The “plates” are the set of engineering drawings at proposed rules 7819.9900 to 7819.9950 that prescribe the maximum levels or restoration.

[40] PUC Reply, at 17.

[41] Exhibit 100, at 15.

[42] LMC Brief, at 33.

[43] PUC Reply, at 8.

[44] PUC Reply, at 18.

[45] SONAR, at 47.

[46] Exhibit 98, at 1.

[47] PUC Reply, at 10.

[48] SONAR, at 48.

[49] PUC Reply, at 12.

[50] Exhibit 100, at 20.

[51] LMC Brief, at 33.

[52] PUC Reply, at 19.

[53] *See*, the findings on proposed rule 7819.1300, *supra*.

[54] The PUC modified the rule to correct a typographical error. Such changes are not substantially different language for the rule as proposed.

[55] PUC Reply, at 20-21.

[56] SONAR, at 56.

[57] SONAR, at 57.

[58] The provision would have acted to limit the LGUs' authority to require removal after the first excavation of the right-of-way, contrary to the PUC's intent.

[59] Minn. Stat. § 216D.04, subd. 3(e)(effective for facilities abandoned after January 1, 1999).

[60] SONAR, at 62.

[61] PUC Reply, at 13.

[62] SONAR, at 68.

[63] Exhibit 97.

[64] Minn. Rule 8810.3300, subp. 3.